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Highways-Dedication-Acceptance by Public Uses

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HIGHWAYS—DEDICATION—ACCEPTANCE BY PUBLIC USER—In 1872 P Co. had purchased an addition to their right of way from M. The deed contained a provision that a path across P's tracks should be kept open as "other street crossings are kept open." M had himself received the land with a reservation that the strip be kept open for road purposes. Later P bound itself in an agreement with M that the crossing would remain open. A path ran from the crossing to M's home. P had done all the work of repairing the crossing and had kept it open continuously, cutting trains across it. The path had been continuously used by the public but from 1886-1896 and 1907-1909 the path was barred at the entrance to M's land to keep cattle out of P's right of way. P sues to enjoin city from using the crossing. *Held:* Land was dedicated and accepted by city thru long use by the public. *Michigan Central R. Co. v. Michigan City*, 169 N. E. 873. *German Bank v. Brose*, 69 N. E. 300, in accord.

To dedicate land to public use there must be an intention on the part of grantor to dedicate, acted upon and accepted by the municipality or the general public. *Williams v. Milley*, 16 Ind. 362. *Gillespie v. Duling*, 41 Ind. App. 217, 83 N. E. 728. The actual intention to dedicate need not

exist but must appear to exist. *German Bank v. Brose, supra.* Of the three deeds here, the deed to M apparently did not amount to a dedication, being to a private person, *P. C. C. & St. L. R. R. v. Warrum,* 42 Ind. App. 179, 82 N. E. 924. The deed from M to P and the subsequent agreement signed by P probably were sufficient, in Indiana, to prove P's intent even though made to third parties since P declared that it was to be kept as other street crossings, thus dedicating it to the public. *Davidson v. City of Birmingham,* 212 Ala. 123, 101 So. 878. But even if intent was not sufficiently shown by the deeds it might have been proved through acts of P and need not by formal document. *Cromer v. State,* 21 Ind. App. 502, 52 N. E. 239. The dedication must be affirmative and intent must be clearly shown. *Miller v. City of Indianapolis,* 123 Ind. 196, 24 N. E. 228. P maintained this crossing as a street intersection for over 20 years; and keeping a road open for the statutory period was presumed to be dedication under Sec. 8709 Burns 1926. *Ross v. Thompson,* 78 Ind. 90; *Carr v. Kolb,* 99 Ind. 53. There was no showing that it was kept open mainly for P's convenience. *Talbot v. Grace,* 30 Ind. 389, 95 Am. Dec. 704.

The question of acceptances, presented here, appears slightly more difficult. Acceptance by the public or by the municipality in the dedication inevocable. *Mansur v. State,* 60 Ind. 357; *P. C. C. & St. L. R. Co. v. Warrum,* 29 Ind. App. 269, 63 N. E. 36. This acceptance need not be by formal ratification; any action by the municipality such as repairs or improvement is sufficient. *Town of Fowler v. Linquist,* 138 Ind. 566, 37 N. E. 133. Nor is positive action absolutely necessary. *Summers v. State,* 51 Ind. 201. There is a presumption in favor of acceptance where the gift is beneficial to the public. *Archer v. Salines City,* 93 Cal. 43, 166 L. R. A. 145. But this presumption does not exist and some positive act is required where the gift would impose a burden upon the public, as in the case of maintenance of highways. Tiffany *Real Property,* Vol. II, p. 1876.

In the principal case there had been no formal or informal acceptance of the dedication other than long continued use. Where the use has run so long that public interests are affected, acceptance is presumed. *Masson v. Skillman,* 127 Ind. 330, 26 N. E. 676. The statement of the principal case that the majority opinion is that mere use will prove acceptance is upheld by *German Bank v. Brose, supra,* and by dicta in *Thompson v. Ross, supra.* Certainly the modern tendency is in accord, even going so far as to charge municipalities with the duty of repairing. 8 Ruling Case Law 900.

The placing of the bars at the entrance to M's land was pertinent to the questions of acceptance by the public user and revocation before acceptance (*Steinbuer v. City of Tell City,* 146 Ind. 490, 45 N. E. 1056; *Lightcap v. Town of North Judson,* 154 Ind. 43, 55 N. E. 952) but, under the facts, such act did not constitute revocation before acceptance by public user.

J. S. G.